No. 02-0960

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In The

Supreme Court of the United States

WALKER LOUISIANA PROPERTIES, J. ORAN RICHARD AND GAME MANAGEMENT, INC.,

Petitioners,

v.

STEVEN BROUSSARD,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

STEVEN BROUSSARD'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Trial Court found Steven Broussard, Respondent, purchased property in Southwest Louisiana with a primary motivation of waterfowl (ducks and geese) hunting. The Trial Court noted the property was well suited for that purpose. The Trial Court found helicopters under the control of Petitioners at times flew excessively low over Broussard's property, thereby scaring off waterfowl. The Court found the low helicopter flights served no legitimate purpose. The Court found the low flying helicopters' disturbance and harassment of waterfowl to be a violation of both federal and state law. The Court found there was nothing peculiar about the location of Broussard's property that would cause or require Petitioners' helicopters to fly over Broussard's property at any time. The Court found the low flying helicopters unnecessarily interfered with Broussard's right to use and enjoy his property. The Court first issued a temporary restraining order requiring Petitioners' helicopters fly at a minimum altitude of 1,000 feet over Broussard's property during waterfowl season. After a Merits Trial, a permanent injunction was issued with the added provision that the helicopters may fly at an altitude under 1,000 feet so long as they are within one-eighth mile of Broussard's northern property line. During the Merits Trial, the Court found Petitioners twice violated the temporary restraining order. (App. 11-12.) (All Appendix references are to the Petitioners' Appendix.) Broussard's right to seek damages for these violations was reserved. (V. 3, p. 585, ll. 16-20.)

QUESTION PRESENTED – Continued

Petitioners frame their question in terms of whether or not a State Court has authority and jurisdiction to regulate the use of navigable airspace where no violations of FAA regulations are involved. Throughout their Petition for Writ of Certiorari, Petitioners take the position federal law completely and entirely preempts any right of the states to exercise any jurisdiction in connection with matters involving navigable airspace.

Respondent contends there is in fact no complete preemption, and the Question Presented should be:

> Given this Court has recognized both federal and state takings claims[1] for otherwise legal low overflights, does a State Court have jurisdiction to issue an injunction enjoining a single operator from flying his helicopter(s) at excessively low altitudes for no legitimate purpose other than scaring off waterfowl and thereby interfering with a landowner's right to use and enjoy his property?

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[1] *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962).

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REASONS TO DENY THE WRIT

Petitioners' Application takes issue with factual findings of the Trial Court. Petitioners' Statement of the Case at pages 2-3 of their Application contend Richard must fly low over Broussard's property to make a safe landing approach, however, the Trial Court found no legitmate purpose for the excessively low flights and found there was nothing about the location of Broussard's property that required Richard to fly over it. (App. 11-12.) Next, Petitioners claim helicopters do not scare waterfowl or in any way adversely affect hunting, which is contrary to the Trial Court's finding that the low flying helicopters serve no legitimate purpose other than to scare and harass waterfowl. (App. 11-12.)

The two factual issues raised by Petitioners are not only at the heart of this case, but necessarily mean Petitioners disagree with the trial court's finding that the low flying helicopter interferes with Broussard's right to use and enjoy his property. The Trial Court found Broussard's right to use and enjoy his property was disturbed by the excessively low flying helicopters. (App. 12.)

This Court does not normally exercise its Writ power where factual disputes are involved.

Further, this Court has clearly recognized the right of a property owner to pursue a taking claim, federal or state, for damages caused by low flying aircraft even when the flights are otherwise legal.[2] The FAA Savings

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[2] *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962).

Clause[3] reserves existing civil remedies to claimants. It is reasonable to allow injunctive relief under the limited circumstances of this case where the excessively low helicopter flights serve no legitimate purpose other than to scare and harass waterfowl (App. 11-12.) The injunction in no way affects interstate commerce, air travel, airline routes, fares or services. It certainly does not affect Petitioners' right to use Richard's helicopters for legitimate purposes.

Broussard filed a Third Supplemental and Amending Reconventional Demand[4] and alleged:

> "19(a).
>
> As a result of J.O. Richard's actions in flying his helicopters over Steven Broussard's property and scaring waterfowl, Steven Broussard has suffered loss of enjoyment of his property, mental anguish and inconvenience and is entitled to damages therefor."

The parties agreed the damage claim would be tried in a subsequent trial/hearing.[5]

Petitioners' Application does not address Broussard's claim for tort damages, but it is clearly authorized by this Court's decision in *Griggs, supra*.

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[3] § 1106 of the Federal Aviation Act, 49 U.S.C., App. § 1506.

[4] Trial Record, V. 1, p. 104.

[5] V. 3, p. 58, ll. 16-20.

It is respectfully submitted there is nothing about the facts of this case that warrant an exercise of this Court's Writ power.

STATEMENT OF THE CASE

Broussard purchased approximately 2,000 acres of land in Southwest Louisiana in 1993. (V. 3, p. 570, ll. 3-5 and Spec. Warr. Deed, V. 2, pp. 377-384.) Shortly after Broussard's purchase of the property, he began experiencing problems with Richard's helicopters flying excessively low over his property and scaring off waterfowl. (V. 3, p. 570, l. 3, p. 571, l. 13.) Within months after Broussard's purchase of the property, he complained in writing to Richard about the low flying helicopters scaring off waterfowl and resulting in complaints from hunters leasing duck/goose blinds from Broussard. (Broussard's 6/17/94 letter, v. 2, p. 356.) Broussard again complained in writing to Richard about the low flying helicopters by letter dated November 20, 1997. (V. 2, p. 339.) The low flying helicopters were an ongoing problem until Richard agreed as part of a 1999 Road Use Agreement to voluntarily restrict his helicopter flights over Broussard's property. (V. 2, pp. 353-355 and pp. 476-477.) In the agreement, Richard agreed not to fly over Broussard's property during hunting season at altitudes under 1,000 feet. (Interestingly, Richard's agreement not to fly his helicopters under 1,000 feet during hunting season comports precisely with the injunction of which Richard now complains.)

In the Road Use Agreement, Broussard gave Richard permission to use roads on Broussard's property in order to access adjacent land Richard leased for hunting. Part of

the Road Use Agreement required Richard provide road maintenance. Richard refused to provide road maintenance as required in the agreement. Broussard complained in writing and orally to Richard regarding Richard's failure to provide road maintenance. Finally, after two years[6] of complaining to no avail, Broussard terminated Richard's road use by locking the gates in January, 1999. (V. 2, p. 423, ll. 4-9 and Broussard's letter, p. 295.)

Once Broussard denied Richard access across his property, the problem with the low flying helicopters soon returned. (Broussard's letter, V. 2, p. 279.)

Nathan Wright, a commercial hunter who leased a hunting blind from Broussard, testified as to having seen Richard's helicopters fly low over Broussard's property many times. Wright testified the helicopters appeared to be flying in such a manner as to drive or scare waterfowl off of Broussard's property with the obvious hope they would go to Richard's neighboring property. (V. 3, p. 563, l. 19 – p. 566, l. 8.)

Petitioners' Application at page 2, paragraph 1, states: "Petitioners must fly reasonably low over the Respondent's adjacent property to make a safe approach to land." The Trial Court found otherwise, wherein it stated: "There is nothing peculiar about the location of Broussard's property that would cause or require Richard's helicopters to fly over Broussard's property at any time." (App. 12.) Petitioners' statement must also be weighed against the fact

[6] Richard was orally allowed to use the road before execution of the Road Use Agreement provided he provided road maintenance.

that Richard voluntarily agreed in the Road Use Agreement to restrict his helicopters to a minimum altitude of 1,000 feet during waterfowl season. Richard abided by the voluntary restrictions until Broussard changed the locks on his road gates because Richard refused to maintain the roads.

At page 3 of his Application, footnote 1, Petitioners state "The overwhelming weight of the testimony indicated that the helicopters did not unduly frighten the waterfowl or in anyway adversely affect hunting on the property." Again, Petitioners are arguing the Trial Court abused its discretion in making a factual finding. The Trial Court specifically found "Helicopters, especially low flying ones, are particularly noisy and scare waterfowl to an extent that it can cause them to leave an area. The low flying helicopter flights serve no legitimate purpose and resulted in waterfowl being unnecessarily scared off Broussard's property." (App. 11.) Because Petitioners are contesting an important factual finding of the Trial Court, Respondent cites the following testimony which supports the Trial Court's factual finding, to-wit: Nathan Wright (V. 3, p. 563, l. 19 – p. 565, l. 25), Steven Broussard (V. 3, p. 569, l. 20 – p. 570, l. 32; p. 583, l. 16 – p. 584, l. 2), and Max Caldarera (V. 3, p. 511, l. 23 – p. 512, l. 12; p. 520, l. 25 – p. 522, l. 5.) Even Richard agreed his helicopters make a lot of noise and scare ducks and geese off the water and ground. (V. 2, p. 487, l. 13 – p. 490, l. 12.) Richard even admitted geese are more sensitive to the noise of a helicopter than ducks. (V. 3, p. 651, l. 29 – p. 652, l. 9.) Even Richard's witness, David Richard, agreed he would rather hunt a blind that did not have helicopter traffic over it. (V. 3, p. 612, ll. 9-28.) Jay Duhon (V. 3, p. 525, l. 17 – p. 526, l. 31.) Donald Vines, a witness for Richard, agreed helicopters scare waterfowl when flying at altitudes between 100

and 150 feet. (V. 3, p. 595, ll. 27-32.) Chad Thieland, a witness for Richard, has seen helicopters scare waterfowl from one property to another. (V. 3, p. 601, l. 6 – p. 602, l. 7.)

At Trial, Richard acknowledged the U.S. Fish and Wildlife Service prohibits helicopters from flying over game reserves at altitudes under 1,000 feet. (V. 2, p. 482.) The reason, because low flying helicopters scare wildlife.

The Trial Court found Richard had in fact violated the temporary restraining order on at least two occasions. (App. 12.) As noted by the Court, one of the violations was videotaped. The videotape was introduced into evidence. The following two photographs are still shots from the videotape.



Photo No. 1

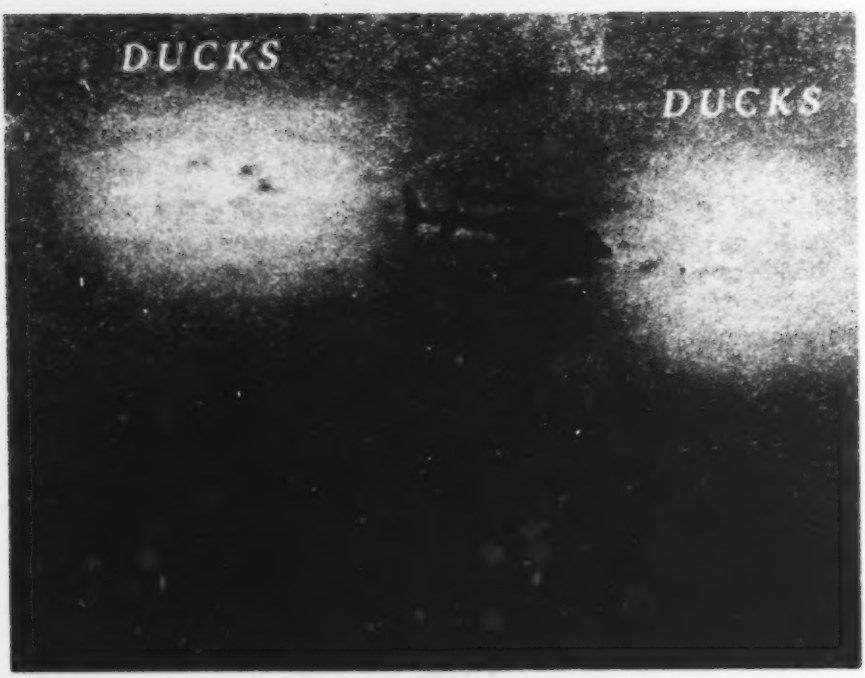


Photo No. 2

In photograph number 1, the helicopter is seen to be flying just above the surrounding trees. While it is difficult to clearly capture the image of ducks in a still shot from a videotape, photograph number 2 depicts ducks flying up around Richard's helicopter. The ducks are much more easily identified in the actual videotape. Even Richard admitted he scarred up a lot of ducks as shown in the video. (V. 3, p. 628, ll. 12-15.)

Petitioners' Application, at page 3, paragraph 2, states the waterfowl "is not Mr. Broussard's property." It is not clear whether or not Petitioners are arguing this gives Richard the right to harass and scare the waterfowl off without regard to any potential consequence. If this is Petitioners' position, then they must acknowledge Richard's actions are a violation of Louisiana and federal law as found by the Trial Court. (App. 12.) LA. R.S. 56:648.1 provides in applicable part:

> "No person shall . . . :
>
> (1) Interfere with the lawful taking of a wild animal by a hunter, trapper, or fisherman or interfere with the process of taking, with intent to prevent the taking.
>
> (2) Disturb a wild animal. . . . "

50 C.F.R. § 19.11(A)(2) provides " . . . no person shall use an aircraft to harass any wildlife."

It would defy logic to contend Broussard's right to use and enjoy his property does not include the benefits flowing from wintering waterfowl that frequent his property.

At page 3 of Petitioners' Application, the last sentence of footnote 1 states "Mr. Broussard, however, felt that 'if you scare one bird away, its adverse.'" Petitioners have

attempted to take part of a statement out of context in order to support his position. Following is the complete response from which Petitioners quote only part:

> It has scared birds off. I mean, the whole – the whole idea of hunting – I guess you – I taken some things to their extreme. If I wanted to go hunt – if you could get a lease at a airport right where there's a lot of air traffic and everything, you'd have a terrible hunting place. Well, I got as far away from that as I could. I got a very remote piece of property that's suitable for waterfowl hunting, and some of the birds are being scared away. Now, not all of them, obviously, but I say if you scare one bird away, it's adverse. *But, I mean, I'm not talking about one bird. I'm talking about lots of birds.* (V. 3, p. 182, ll. 16-28.) (emphasis added.)

SUMMARY OF ARGUMENT

At issue is whether a State Court has jurisdiction to enjoin low flying helicopters that serve no legitimate purpose other than to harass and scare waterfowl. Petitioners argue the State Court's actions are in direct conflict with federal law and FAA regulations and, therefore, are invalid due to preemption. Petitioners contend federal law completely preempts state law regarding navigable airspace, control of aircraft in flight, noise control and aviation routes.

Petitioners, at page 22, footnote 8, of their Application states since Richard did not violate any FAA regulations, any complaint by Respondent to the FAA would have been unavailing. Respondent agrees, which is the reason he did

not seek relief pursuant to the administrative procedures of the FAA.

Essentially, Petitioners take the position since Richard was not in violation of any FAA regulations, the law offers no remedy whatsoever to Broussard for the loss of the use and enjoyment of his property.

Contrary to Petitioners' arguments, the Federal Aviation Act does not expressly preempt state damage remedies. To the contrary, § 1106 of the Federal Aviation Act, 49 U.S.C. App. § 1506, provides: "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001), the Court found " . . . the Federal Aviation Act has no civil enforcement provision or any provision allowing a private resident to sue for the property torts of an airline pilot or airport operator. This is seemingly fatal to a claim of complete preemption." (Citations omitted.)

This Court in *Causby, supra,* and *Griggs, supra,* recognized the validity of both federal and state takings claims in connection with low overflights.

In the case at hand, we are dealing with a single operator of helicopters who was found to be flying his helicopters at excessively low altitudes for no legitimate purpose other than to scare off waterfowl. There is no airport involvement. The involved area is rural. There is no burden on interstate commerce. Richard was not

required to change his route of flight, but to merely maintain a minimum altitude of 1,000 feet during waterfowl season if he chose to fly over Broussard's property.

As noted by Petitioners, there is no FAA regulation prescribing a minimum altitude for helicopter flight, but certainly that does not mean a helicopter can be flown excessively low for no legitimate purpose other than to scare waterfowl. The Fifth Amendment of the United States Constitution affords Respondent the right not to be deprived of his property, which certainly includes its use and enjoyment. When you weigh the competing interest of Petitioners and Respondent, it seems the right of Broussard to use and enjoy his property would outweigh any right Richard has to fly his helicopters at excessively low altitudes so as to unnecessarily scare and harass waterfowl.

There is no complete preemption as argued by Petitioners. Petitioners' tortuous interference with Respondent's right to use and enjoy his property is sufficient for a State Court to invoke its powers of injunctive relief under the limited facts of this case. Respondent's claim for tort damages is still pending. (V. 1, p. 104 and V. 3, p. 58, ll. 16-20.)

ARGUMENT AND AUTHORITIES

FAA REGULATIONS PROVIDED NO REMEDY FOR BROUSSARD

While Petitioners argue throughout their Application Respondent should have filed an administrative complaint with the FAA,[7] Petitioners, at page 22 of their Application, footnote 8, acknowledge any complaint to the FAA would have been unavailing because the record did not contain any evidence Richard violated any FAA regulation. In fact, even a violation of FAA regulations would afford Broussard no recourse through the FAA because FAA regulations provide no private right of action for land owners.[8]

Since the FAA provides no recourse for a landowner such as Broussard, the question then becomes "Is other recourse available?"

THERE IS NO COMPLETE PREEMPTION OF STATE REGULATION OF AIRCRAFT NOISE

Beginning at page 15 of his Application, Petitioners argue there can be no state regulation as concerns aircraft noise because the field has been entirely preempted by federal legislation and regulations.

First, the Trial Court in this matter did not order Richard to alter his route of flight, but instead ordered all flights over Broussard's property during waterfowl season

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[7] See Petitioners' Application, pp. 6, 22 and 23.

[8] See *Vorhees, supra*, at 404.

be at altitudes of 1,000 feet or greater unless conducted within one eighth of a mile of Broussard's northern boundary. Specifically, the Trial Court did not order Richard to somehow reduce the noise emitted by his helicopter or change his route or times of flight.

Petitioners, in support of their argument, cites this Court's decision in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); there were four dissents. This Court's decision in *City of Burbank* has not been read by other Courts as requiring complete preemption of all common-law remedies for aircraft noise, e.g., see *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), wherein the Court stated at 472 of its opinion "We overrule *Luedtke*[9] to the extent it holds all common law remedies for airport noise and pollution have been preempted by federal law." The *City of Burbank* case involved an ordinance enacted by the City of Burbank forbidding departures of jet aircraft from a privately-owned airport between 11 p.m. and 7 a.m. This Court noted such curfews could result in increased congestion, cause a loss of efficiency and aggravate the noise problem. The Court noted the ordinance amounted to a regulation that could effect the FAA's entire scheme of regulating air traffic. In the case sub judice, no such potential exists. This case involves limited and peculiar circumstances. There is only one operator involved, the injunction is directed at no one other than Richard, the injunction does not require Richard to change routes or hours of flight, but only limits his

[9] *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

flights to a minimum altitude of 1,000 feet while over Broussard's property during waterfowl season.

Petitioners, at page 15 of their Application, also cite the case of *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2nd Cir. 1968) in support of their argument for total federal preemption of aircraft noise control. Contrary to Petitioners' argument, the *Town of Hempstead* case does not support an argument for total preemption. Hempstead passed an Unnecessary Noise Ordinance seeking to limit operation of certain aircraft within the Town. Compliance with the ordinance would require many aircraft to fly into and out of John F. Kennedy Airport in patterns that would be in large part incompatible with existing traffic patterns and FAA procedures. The Court agreed the ordinance was in direct conflict with valid applicable federal regulation and, therefore, invalid based on federal preemption. ***However***, the Court noted at page 369, footnote 4, "But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; *another noise ordinance might not have that effect.*" (emphasis added.) In the case sub judice, the injunction does not seek to regulate "flight paths or procedures."

THE AIRLINE DEREGULATION ACT (ADD) DOES NOT PREEMPT RESPONDENT'S STATE LAW REMEDIES

Beginning at page 16 of his Application, Petitioners argue the Airline Deregulation Act of 1978 preempts any claim Respondent may have under state law.

This Court held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), " . . . A state enforcement action

is preempted if it has a connection with, or reference to airline 'rates, routes, or services.'" In the case sub judice, the complained of injunction in no way purports to regulate or has any connection with "airline rates, routes, or services."

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court at page 232 of the opinion, found the ADA does not preempt all state-law-based claims. The Court noted the FAA's saving clause, § 1106, 49 U.S.C. App. § 1506 (preserving "the remedies now existing at common law or by statute"), when read together with the ADA's preemption clause, § 1305(a)(1), stops states from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves an airline dishonored a term the airline itself stipulated. Again, in the case sub judice, there is no state action with respect to rates, routes, or services.

In *Peterson v. Continental Airlines, Inc.*, 970 F.Supp. 246 (S.D. N.Y. 1997), the Court held there is no preemption where a state law's impact on an air carrier's services is tenuous, remote, or peripheral. The Court further noted the ADA does not preempt claims for outrageous conduct that goes beyond the scope of normal aircraft operations.

For claims to be preempted by the ADA, two things must be true: (1) the claim must derive from enactment or enforcement of state law, and (2) the claim must relate to airline rates, routes, or services either by expressly referring to them or by having a significant economic effect upon them. See *Chrissafis v. Continental Airlines, Inc.*, 940 F.Supp. 1292 (N.D. Ill. 1996).

The FAA's Saving Clause, when read with the ADA's preemption clause, should preserve Respondent's right under state law to the use and enjoyment of his property. Whether that right is enforced by injunction and/or a claim for tort damages should be of no consequence so long as the injunction does not seek to impose substantive standards with respect to rates, routes, or services of an airline. There is no impact on Richard's right to use his helicopters for legitimate purposes.

THE LAW DOES PROVIDE RESPONDENT A REMEDY FOR THE LOSS OF USE AND ENJOYMENT OF HIS PROPERTY

The Trial Court found Petitioners' excessively low flying helicopters serve no legitimate purpose and unnecessarily scared waterfowl off Broussard's property, thereby violating Broussard's right to use and enjoy his property.

Petitioners' argument against the State Court jurisdiction goes beyond the claim by Petitioners that the entire field of aviation is entirely preempted by federal law. Petitioners argue the only remedy available to Broussard would have been through the FAA regulations, but since there was no FAA violation, this avenue is closed. Petitioners' position that State Courts have no jurisdiction coupled with Petitioners' acknowledgment that the FAA offers no remedy in this matter leads to but one conclusion, i.e., the law affords Broussard no remedy for the loss of the use and enjoyment of his property. Nowhere in Petitioners' Application is there an acknowledgment that the law offers Broussard recourse for the loss of the use and enjoyment of his property. Essentially, Petitioners take the position that since the helicopter was flying

within the FAA regulations, nothing can be done to protect Broussard's property rights.

As a starting point, the Fifth Amendment of the United States Constitution provides no person shall be deprived of life, liberty or property without due process of law. Respondent asserts the position taken by Petitioners would violate his Fifth Amendment property rights. In determining what constitutes a Fifth Amendment "taking," Courts have relied upon state law.[10]

La. Civ. Code Art. 477 provides in pertinent part:

> "A. Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."

In *Causby, supra*, this Court recognized a Fifth Amendment takings claim based on frequent low overflights by military aircraft. The plaintiffs operated a chicken farm near a municipal airbase that had been leased by the government for use by military aircraft. Plaintiffs had to give up their chicken business as a result of noise from the low overflights that frightened the birds. Plaintiffs claimed the United States had taken an easement over their property, resulting in the value of the property being destroyed. Much like Petitioners in the case sub judice, the United States claimed under the Air Commerce Act as amended by the Civil Aeronautics Act, the United States had complete and exclusive national

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[10] *Causby, supra*, at 266.

sovereignty of the airspace over this country. The government argued because its flights were within the minimum safe altitudes of flight which had been prescribed, they were in exercise of the declared right of travel through airspace.

Beginning at the bottom of page 20 of his Application, Petitioners cites language from *Causby* in support of Petitioners' claim that a private citizen has no right to claim a trespass in the airspace over his property. However, Petitioners neglected to point out limitations on the use of this airspace by the public as noted in *Causby*, page 264, where this Court stated:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere . . . The fact that he does not occupy it in a physical sense – by the erection of buildings and the like – is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.

The Court in *Causby* went on to recognize the plaintiff's claims for loss of use and enjoyment of his property. In so holding, this Court noted "our holding that there was an invasion of Respondent's property is thus not inconsistent with the *local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.*" (*Causby, supra,* p. 266.) (emphasis added.)

Petitioners' Application, at page 21, footnote 6, attempts to "discount" the relevance of the *Causby* decision by stating "no tort action for damages was pursued."

Petitioners, as already noted, are clearly wrong in this assertion. (See Broussard's Supp. Pet., V. 1, p. 104 and agreement to try damages in later proceeding, V. 3, p. 58, ll. 16-20.)

As noted by the Appellate Court below, LA. C.C. Art. 490 provides the ownership of a tract of land carries with it the ownership of everything directly above or under it. The Court recognized the airspace may be used for air traffic at reasonable altitudes. However, the Court noted Richard's operation of his helicopter at excessively low levels interfered with Broussard's right to use and enjoy his land. (App. 8-9.)

LA. C.C.P. Art. 3601 provides an injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant.

LA. C.C.P. Art. 3663 clearly provides injunctive relief is available "to protect or restore possession of immovable property or of a real right therein, is available to: . . .

> (2) A person who is disturbed in the possession which he and his ancestors in title have had for more than a year of immovable property or a real right of which he claims the ownership, the possession *or the enjoyment.*" (emphasis added.)

The Trial Court found Richard's use of his helicopters to harass and scare wildlife constitutes a violation of both federal and state law. LA. R.S. 56:648.1 provides in applicable part:

> "No person shall . . . :
>
> (1) Interfere with the lawful taking of a wild animal by a hunter, trapper, or fisherman or

interfere with the process of taking, with intent to prevent the taking.

(2) Disturb a wild animal. . . . "

50 C.F.R. § 19.11(A)(2) provides " . . . no person shall use an aircraft to harass any wildlife."

Louisiana Courts have made it clear that just because a criminal prosecution may be warranted, this does not prohibit a Court from issuing a civil injunction if the complained of conduct is injurious to property interests. *Connick v. Lucky Pierre's*, 331 So.2d 431 (La. 1976).

If the conduct sought to be enjoined is a violation of law, then the party seeking the injunction is relieved of the obligation of proving irreparable injury. *Smith v. W. Virginia Oil & Gas Co.*, 365 So.2d 269 (La. App. 2d Cir. 1978); writ granted on other grounds, and *Hughes v. Muckelroy*, 97-0618 (La. App. 1st Cir. 9/23/97), 700 So.2d 995.

This Court, in *Griggs, supra,* recognized the validity of a State Court action for taking under the 14th Amendment of the United States Constitution for low overflights.

The *Causby* and *Griggs* decisions make it clear there are limitations upon the activities of aircraft flying within "navigable airspace" that can result in civil remedies (federal or state). In the case sub judice, because Petitioners' excessively low flying helicopters over Broussard's

property served no legitimate purpose;[11] Broussard sought injunctive relief as well as tort damages.

In *Smith v. United Airlines*, No. 00 C 50373, 2002 WL 31236392 (N.D. Ill. Oct. 3, 2002), the issue was whether or not a state law negligence claim arising from an airline passenger being struck by falling luggage was completely preempted by the Federal Aviation Act (FAA) and Airline Deregulation Act (ADA). The Court noted the FAA lacked any civil enforcement provisions that would allow a private citizen to sue for personal injury. The Court found neither the FAA nor the ADA affords a complete preemption of state law claims. Plaintiff was allowed to pursue his negligence claims in state court.

In the case of *Town of East Haven v. Eastern Airlines, Inc.*, 470 F.2d 148 (2nd Cir. 1972), the Court recognized plaintiff's right to recover damages for diminution of plaintiff's property value as a result of low overflights to and from nearby airports. The fact that the flights were legal did not effect plaintiff's rights to recover.

Likewise, the Supreme Court of Texas in *City of Austin v. Travis County Landfill Company, L.L.C.*, 73 S.W.3d 234 (TX 2002), recognized the right of citizens to pursue state law claims for compensation as a result of loss of use of enjoyment of their property due to low overflights.

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[11] The Trial Court specifically found Richard's excessively low flying helicopters served no legitimate purpose and resulted in waterfowl being unnecessarily scared off of Broussard's property. (App. 11.)

In *Erie Municipal Airport Authority v. Agostini*, 127 Pa.Cmwlth. 360, 561 A.2d 1281 (1989), the Court recognized claims for "takings" as a result of low overflights.

In *Palm v. United States, Bartleson v. United States, Jones v. United States and Palm v. United States*, 835 F.Supp. 512 (U.S. Dist. Ct. N.D. CA 1993), the Court recognized the right of landowners to pursue federal and state tort claims against the United States based upon exploding projectiles and low overflights from military aircraft.

In *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932), the Court held plaintiffs were entitled to enjoin the use of an airport where its operation would seriously interfere with plaintiffs' use of their property.

In *Brenteson Wholesale, Inc. v. Arizona Public Service Company*, 166 Ariz. 519, 803 P.2d 930 (Az. App. 1990), a power company sought an injunction against the owner of an adjacent airport to prohibit use of the airstrip because it interfered with the power company's use of its land (danger of high voltage lines). The Court of Appeal used a balancing test to determine the reasonableness of the interference. The court granted the injunction prohibiting use of the airstrip.

In the case sub judice, a balancing test would compare Broussard's loss of use and enjoyment of his property to the right of Richard to fly his helicopters at "excessively low altitudes for no legitimate purpose."

EQUITY FAVORS PROTECTING BROUSSARD'S PROPERTY RIGHTS VIA INJUNCTIVE RELIEF

This Court in *Causby* and *Griggs* recognized a landowner's right to assert a takings claim (federal or state) for loss of value of plaintiff's property due to low overflights. Damages in these cases were somewhat fixed and subject to a "one time" assessment. The loss of the chicken business in *Causby* was a pecuniary loss readily subject to evaluation. In *Griggs*, the plaintiff's home was deemed not suitable for residential purposes due to airplane noise. The loss to *Griggs* was readily ascertainable by traditional methods.

The factual circumstances of the case at hand do not easily lend themselves to traditional tort damages. Not only would it be difficult to fix damages for any given infraction, but Broussard would be required to file another claim every time Richard decides to scare birds off Broussard's property. Further, there is no way for Broussard to know of all of Richard's flights nor the extent of damage from any low flight not witnessed. The most logical solution is simply to prohibit these low flights that "serve no legitimate purpose." An injunction is a reasonable method to solve the problem. An injunction allows Broussard to exercise his right to use and enjoy his property. An injunction under the facts of this case has *no* effect on interstate commerce, air traffic, airline routes, prices or services. It would be a reasonable interpretation of the FAA's "Saving Clause" to allow for injunctive relief under these limited facts and circumstances. On the other hand, it would seem unreasonable to require Broussard to bring Richard back to Court every time there is a violation; this would result in unnecessary litigation and expense. (Tort victims in

Louisiana cannot recover attorney fees or punitive damages.)

The activity sought to be enjoined has nothing to do with the legal use of Richard's helicopters. None of the activities[12] mentioned at page 2 of Petitioners' Application would be affected, nor does the injunction have any bearing on the "911" policy reasons argued at page 24 of Petitioners' Application.

CONCLUSION

The "bottom line" of Petitioners' arguments is since Richard was not violating any FAA Rules, Broussard has no remedy under any law for the loss of use and enjoyment of his property due to the low overflights. Accepting Petitioners' argument, because Broussard lives in a rural area, Richard is free to hover over Broussard's home at any altitude he chooses so long as he does not endanger persons or property. In fact, if someone is having a political gathering out in the country, a political spy could hover his helicopter 20' over the crowd and the law could offer no recourse so long as there was no danger to persons or property.

Petitioners argue the events of "911" make the case for total federal preemption that much more compelling. But, if you accept Petitioners' argument that only FAA violations can result in a remedy, then even the federal

[12] Petitioners said they use his helicopter to transport hunters, check for poachers, manage cattle, etc.

government could not stop "excessively low helicopter flights that served no legitimate purpose" even if deemed a potential security risk or terrorist threat.

There is no complete preemption as argued by Petitioners. Takings claims, state and federal, have been recognized by this Court. Other Courts, federal and state, have recognized the right of injunctive relief where low overflights interfere with a person's right to use and enjoy his property.

An injunction is a reasonable remedy under the FAA Savings Clause. The injunction herein is directed at one individual under a peculiar and limited circumstance. The enjoined flights were found to serve no legitimate purpose. The injunction does not require Petitioners to change routes, time of flights; it does not affect interstate commerce or regulate airline routes, prices or services.

As discussed in *Peterson, supra*, there should be no preemption under the facts of this case because any impact on Richard's services is tenuous, remote or peripheral. Further, flying a helicopter excessively low for no legitimate purpose other than to scare and harass waterfowl would seem to fit within the *Peterson* court's description of "outrageous conduct" and, hence, no preemption.

Because Petitioners cite important factual findings of the Trial Court as being in error and because the injunction is a reasonable protection of Broussard's property

rights, the facts and circumstances of this case do not warrant an exercise of this Court's Writ power.

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